IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 5, 2006

STATE OF TENNESSEE v. SCOTTIE ELLIS CLARK

Appeal from the Circuit Court for Franklin County
No. 12550 J. Curtis Smith, Judge

No. M2006-00693-CCA-R3-CD - Filed March 8, 2007

The Appellant, Scottie Ellis Clark, appeals the revocation of his probation by the Franklin County Circuit Court. In 2000, Clark entered a "no contest" plea to attempted aggravated sexual battery and received a six-year suspended sentence with supervised probation. In 2005, a probation violation warrant was issued alleging that Clark had violated his probation by committing new crimes. Clark asserts that the trial court abused its discretion when it revoked his probation and that the State engaged in prosecutorial misconduct which deprived him of due process during his revocation hearing. After review, we find no error and affirm the judgment.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and J.C. MCLIN, JJ., joined.

Brent Horst, Nashville, Tennessee, for the Appellant, Scottie Ellis Clark.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; and Will Dunn, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

On January 6, 2000, the Appellant entered a "no contest" plea to attempted aggravated sexual battery of his stepson, the instant victim's half-brother. He received a six-year sentence, which was suspended, and he was placed on supervised probation. On November 18, 2005, a probation violation warrant was issued alleging that the Appellant had violated the conditions of his probation, specifically "by his failure to obey the law in violation of Probation Rule #1 since he was arrested November 8, 2005, on charges of Aggravated Sexual Battery, Sexual Battery, Rape, and Incest." The probation violation warrant was later amended to include allegations that the Appellant also committed the offenses of observation without consent, possession of pornography on his computer

hard drive, and failure to abide by the "Board of Probation and Parole Sex Offender Directives." On March 1, 2006, the trial court conducted a revocation hearing in which the victim, the Appellant, and numerous other witnesses testified.

Melissa Jackson, the victim's mother, testified that the victim's birthday is June 12, 1987. Ms. Jackson stated that in October 1997, she married the Appellant and he moved into the home with her and her two children, J.M., who was five years old, and the victim, who was ten years old. Ms. Jackson related that when the Appellant was indicted for molesting J.M., J.M. was placed in foster care and ultimately in the custody of his father. The victim was twelve years old when the Appellant entered a "no contest" plea to the attempted sexual battery of J.M.

The victim, who was eighteen years old at the time of the revocation hearing, testified that she had been sexually abused by the Appellant for about two years, beginning when her half-brother was removed from their home. She stated that when she was twelve, the Appellant asked her to give him a "hand job," and, on another occasion, she was instructed to straddle her nude body over his genitals while he masturbated. She related that after she turned thirteen in June, 2000, there were "three or four" times when he would have her masturbate him. She stated that, on one occasion, he took her for a ride on the family's four-wheeler and fondled her private parts and penetrated her vaginally with his finger. Further, she stated that, on another occasion, he furnished her alcoholic beverages, and she woke up when she felt something go inside her vagina. She testified that after this incident she threatened to tell her mother and that this was the last time the Appellant had any sexual contact with her. She was thirteen years old at the time.

The victim testified that, when she was seventeen, she realized that the Appellant was peering at her when she undressed to get in the tanning bed, while she lay in the tanning bed, and when she dressed in her bedroom. The victim noticed that each time she went into the tanning room, someone had raised the mini-blinds above the window sill so that someone standing outside her window could look inside. She also noticed that someone had cut out one of the mini-blinds which covered her bedroom window, allowing someone to watch her get dressed. The victim testified that many times, when she was getting ready to get in the tanning bed, she noticed that the Appellant would go outside to walk the dog.

At the hearing, the Appellant denied having any sexual contact with the victim and denied that he had ever spied on her when she was in the tanning room or getting dressed. He stated that the day before the victim made these allegations, they had an argument because the victim thought he was unfaithful to her mother. He explained that he and Ms. Jackson were in the process of buying a home, and the victim made these allegations to divide them. Later, Ms. Jackson filed for divorce. The Appellant introduced an excerpt from the victim's diary, written when she was fourteen years old, in which she identified persons she had "slept with," and his name was not on the list.

The trial court found that the Appellant had violated the conditions of his probation based on "new criminal conduct" involving the victim. The trial court revoked the Appellant's probation and ordered that his six-year sentence be served in confinement. This appeal followed.

Analysis

A trial court may revoke probation and order the imposition of the original sentence upon a finding by a preponderance of the evidence that the person has violated a condition of probation. T.C.A. § 40-35-310, -311 (2006). The decision to revoke probation rests within the sound discretion of the trial court. *State v. Mitchell*, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). Revocation of probation is subject to an abuse of discretion standard of review. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). This court will find a trial court abused its discretion only if the record contains no substantial evidence that a violation of probation has occurred. *Id*. at 82; *see also State v. Gregory*, 946 S.W.2d 829, 832 (Tenn. Crim. App. 1997). The State is not required to prove the violation beyond a reasonable doubt, and the evidence is sufficient to support a revocation if the evidence shows that the trial judge exercised a conscientious and intelligent judgment, rather than acting arbitrarily. *Gregory*, 946 S.W.2d at 832; *State v. Leach*, 914 S.W.2d 104, 106 (Tenn. Crim. App. 1995).

I. Abuse of Discretion in Revoking Probation

On appeal, the Appellant challenges the revocation of his probation on two grounds. First, he asserts that "the Court abused its discretion in crediting the testimony [of the victim] and that there is no substantial evidence to support the Court's finding that the Appellant committed a new offense."

This argument is clearly misplaced. In a probation revocation proceeding, the credibility of the witnesses is to be determined by the trial judge, who is the finder of fact. *Mitchell*, 810 S.W.2d at 735. The scope of our examination of the revocation evidence is not equivalent to that of the trial judge's. In a challenge to the sufficiency of the revocation evidence, our examination does not include the revisiting of inconsistent, contradictory, implausible, or non-credible proof, as these issues are resolved by the trial judge. *State v. Beard*, 189 S.W.3d 730, 735 (Tenn. Crim. App. 2005). Rather, we look to the record to determine whether there was "no substantial evidence" to support the trial judge's conclusion that a violation had occurred. Indeed, in this case, the Appellant does not contend that no evidence was introduced to support the violation, only that the evidence that was produced was not credible.

The proof at the revocation hearing established that two instances of sexual contact occurred with the victim by the Appellant, or the Appellant by the victim, when the victim was less than thirteen years of age. *See* T.C.A. § 39-13-504(a)(2) (2006). The victim testified that the Appellant asked her to give him a "hand job" and that she would touch his penis until he ejaculated. Additionally, the victim testified that, while naked, she was instructed to straddle the Appellant, and "[h]e would have [her] rock back and forth" until "he would ejaculate himself." The victim testified that after reaching thirteen years of age, there were "three or four times he would have [her] masturbate him." *See* T.C.A. § 39-13-505(a)(2) (2006). Two separate instances of sexual penetration are supported by the victim's testimony. *See* T.C.A. § 39-13-501(7) (2006). One instance occurred after the victim and the Appellant were riding on a four-wheeler in 2001 and the

Appellant put his hands inside her pants and she felt his finger go inside her. The second incident occurred when the Appellant furnished the victim Smirnoff Ice and she became drunk. The victim related that during her state of intoxication, the Appellant got on top of her and she felt "something going inside of me in my vagina area." With regard to the offense of observation without consent, Tennessee Code Annotated section 39-13-607(b) (2006), circumstantial evidence established that the Appellant would watch the victim undress in her bedroom and peer at her while she was naked in the tanning room.

At the conclusion of the hearing, the trial court found as follows:

> Of course, there was a lot of proof to consider, but as in cases of this type it very much boils down to the [Appellant's] testimony and whether it's credible and the victim's testimony and whether it's credible. I've carefully considered all of the testimony, but particularly [the victim's] and the [Appellant's] testimony. I find that her testimony is credible. Thus, I find by a preponderance of the evidence that new criminal activity did occur.[1] That the State has met it's burden by a preponderance of the evidence to show that. Of course there was a lot of other circumstances that I considered, circumstantial evidence, but her testimony I do find credible.
>
> Then the issue becomes how I deal with the fact that the State has met the burden. Given the facts and circumstances here I find that it's appropriate that he should serve his time in the Department of Corrections, so thus that is my ruling. That his probation is revoked, that he'll serve his time in the Department of Corrections.

After review, we conclude that there is substantial evidence to support the trial court's finding that the Appellant violated a rule of probation by committing new offenses. Accordingly, no abuse of discretion is shown. This issue is without merit.

II. Violation of Due Process Due to Prosecutorial Misconduct

Second, the Appellant asserts that the "prosecutor's use of numerous leading questions and his scolding and intimidation of the sole material witness [the victim] violated the Appellant's right to due process."

With regard to this argument, the Appellant asserts that the prosecutor improperly posed leading questions to the victim concerning the various and distinct acts of sexual misconduct and the corresponding dates on which the acts occurred. The Appellant acknowledges that almost all of the objections to the leading questions were sustained by the trial court. He argues, however, that the

[1] Notwithstanding the finding that new criminal activity did occur, the trial court found that the evidence was insufficient to establish that the Appellant was in possession of pornographic or sexually explicit materials on the hard drive of his computer, as alleged in the amended violation warrant.

damage was incurred upon the asking of the improper leading questions, and, although the objection was sustained, the witness was able to "read the play" and respond to the leading question.[2]

First, we would observe that this proceeding was conducted by a learned and experienced trial judge who is more than able to separate the proverbial wheat from the shaft when confronted with tainted leading questions. Moreover, if, in fact, the questions were leading, no prejudice has been shown.

Second, revocation proceedings are informal in nature, as evidenced by relaxed rules regarding the admissibility of evidence, the absence of a jury, and a preponderance of the evidence burden of proof. *See* T.C.A. § 40-35-311(c)-(e) (2006); *see also Barker v. State*, 483 S.W.2d 586, 589 (Tenn. 1972) (probationers are not entitled to receive the full range of due process rights which are accorded to a person who is not yet convicted).

Third, Tennessee Rules of Evidence 611(c) provides that "leading questions should not be used on the direct examination of a witness except as may be necessary to develop testimony." (emphasis added). Although the victim was eighteen years old when she testified at the revocation hearing, her testimony related to emotionally disturbing sexual events which occurred when she was only twelve years of age, and, under these circumstances, some degree of latitude may be afforded.

Finally, the Appellant concedes that he is "unable to find any judicial precedent expressly stating that the use of leading questions constituted a violation of a defendant's due process rights." We equally are unaware of any such authority, particularly when the leading question is not permitted, and, for all of the above reasons, conclude that this issue is without merit.

The Appellant also complains that the prosecutor's "use of intimidating tactics . . . toward a state witness in order to solicit desired testimony constitutes a violation of a defendant's right to due process." The Appellant cites several cases regarding a defendant's right to challenge the voluntariness of a witness' statement within the trial context on due process grounds; however, these cases have no application to this case because the voluntariness of the victim's statement in this case has never been in dispute.

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[2] The following example is illustrative:

> [PROSECUTOR]: I want to take you back to right before you turned 13, and specifically I think it was between January of 2000 and June the 12th of 2000.
>
> [DEFENSE COUNSEL]: Judge, I object to the leading. He just fed her the exact dates of where he's going.
>
> THE COURT: Sustain as to leading.

Moreover, the Appellant asserts that the prosecutor's manner of questioning was so emotionally overbearing that it resulted in the victim breaking down and crying on the witness stand. He asserts that her testimony was unreliable because it was the product of the prosecutor's intimidation. Our review of the record, however, reveals that, in large part, it was the Appellant's publication at the hearing of the intimate details of the victim's sexual affairs, which she had recorded in her diary, that reduced her to tears. The Appellant cross-examined the victim regarding pages in her personal diary in which she identified four boys she had "slept with." The Appellant also questioned her regarding pictures she and her fiancé took, when she was fifteen years old, which she described as showing "me and him having sex." She stated she was ashamed and "didn't want nobody seeing those pictures." Several years before the trial, the victim discovered that someone had removed pages from her diary and someone had stolen the pictures from their hiding place. She explained why she became emotional:

> THE COURT: She's crying because of the tone of your voice not the questions.
>
> [THE VICTIM]: No, I'm crying because . . .
>
> [PROSECUTOR]: Why are you crying?
>
> [THE VICTIM]: I can't believe he took my personal property from me especially pictures like that, and he didn't even show my mother. You would think he would show my mother before him taking it, and keeping it all these years, that's what's bothering me.

After review, we conclude that there is no evidence that the State's conduct had the effect of overbearing the victim's will or producing false testimony. Our review necessarily encompasses the requirements of due process that are applicable to a probation revocation hearing under the dictates of *Gagnon v. Scarpelli*, 411 U.S. 778, 785-86, 93 S. Ct. 1756, 1761-62 (1973). We conclude that the Appellant's hearing satisfied those requirements as: he received notice of the alleged violation; the evidence against him was disclosed to him; he had the opportunity to be heard and present witnesses; he confronted and cross-examined the State's witnesses; his case was heard before a neutral and detached body; and the transcript contains a statement of the fact finder regarding the evidence relied on and the reasons for revoking the Appellant's probation.

CONCLUSION

Based on the foregoing, we conclude that the Franklin County Circuit Court did not abuse its discretion in finding that the Appellant violated the terms of his probation and, thus, was authorized to reinstate the Appellant's original sentence of six years in confinement. Accordingly, the judgment of the trial court is affirmed.

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DAVID G. HAYES, JUDGE